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IN THE

Supreme Court of the United States

October Term, 1985

NANNIE CLARK,

Petitioner

vs.

INDIANA DEPARTMENT OF PUBLIC WELFARE
and THE DIRECTOR OF THE
INDIANA DEPARTMENT OF PUBLIC WELFARE

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, FIRST DISTRICT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Must a prospective litigant file a notice of tort claim prior to filing a 42 U.S.C. §1983 action in state court.

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BRIEF OF RESPONDENTS IN OPPOSITION

The respondents, Indiana Department of Public Welfare and the Director of the Indiana Department of Public Welfare, respectfully request that this Court deny the petition for writ of certiorari to review the judgment and opinion of the Indiana Court of Appeals, reported at 478 N.E.2d 699.

STATEMENT OF THE CASE

Petitioner Clark is a Medicaid recipient. In November, 1980, she requested the welfare department to approve payment under the Medicaid program for dentures to replace her missing teeth. Her request was denied. Clark

pursued and exhausted the administrative remedies established by the welfare department. She requested an administrative hearing within thirty days of the effective date of the denial, as required by 470 Ind. Admin. Code §2-1-11. The denial of payment for dentures was sustained, following a hearing before an officer appointed by the state department of public welfare. Clark then requested review of the denial by the State Board of Public Welfare. The Board also sustained the refusal to pay for dentures. On August 24, 1981, Smith, the acting director of the welfare department, issued Clark a notice of final agency action in which he notified her that the Board had sustained the denial of payment for dentures.

On September 9, 1981, Clark filed an action in an Indiana trial court against two defendants; the state welfare department and its acting director, Smith. The first count of Clark's complaint was a petition for judicial review of the agency's decision under the Indiana Administrative Adjudication Act (AAA), Ind. Code §4-22-1-14. The second count was a complaint for damages and declaratory and injunctive relief under 42 U.S.C. §1983. Clark alleged that by denying her approval for dentures, the welfare department was violating her rights under the United States Constitution and the federal Medicaid statute. Nanny Clark did not submit a notice of tort claim to the Respondents and the Office of Attorney General pursuant to the Indiana Tort Claims Act, Ind. Code §34-4-16.5-7.

After Clark filed suit, the question of payment for Clark's dentures was remanded to the agency for another hearing. The second hearing officer ruled in favor of Clark who was then able to obtain her dentures. The welfare department and Smith still argued in the trial court, however, that Clark was not entitled to pursue her claim for damages under §1983 because, among other things, she had not complied with the notice provisions of the tort claims act.

On March 13, 1984, the trial court entered an Order and Decision which found that the welfare department and

Smith had violated Clark's constitutional and federal statutory rights. The trial court further held that Clark's claim for damages under §1983 was not barred by her failure to pursue relief under the tort claims act prior to filing suit. On July 22, 1984, after a hearing on damages, the trial court awarded Clark damages in the amount of One Thousand Dollars ($1,000.00). The welfare department appealed.

On May 30, 1985, the Indiana Court of Appeals, First District, reversed the damage award. The court held that the Indiana Tort Claims Act applied to §1983 claims filed in state court and that Clark's damage claim was barred by her failure to comply with that statute.

The Court of Appeals denied Clark's petition for rehearing without opinion on July 10, 1985.

On July 30, 1985, Nannie Clark filed a Petition for Transfer of the appellate court decision to the Indiana Supreme Court. The Petition for Transfer raised, for the first time throughout the course of the litigation, the issue of whether a plaintiff seeking relief under 42 U.S.C. §1983 in state court can be required to exhaust state administrative remedies. On December 20, 1985, the Indiana Supreme Court denied transfer without opinion by a three to two vote.

ARGUMENT

I.

CLARK'S PETITION SHOULD BE DENIED BECAUSE THIS COURT DOES NOT RENDER OPINIONS WHICH ARE ADVISORY OR BASED ON IMPROPERLY PRESENTED FEDERAL QUESTIONS

The question Clark petitions this Court to address was never properly presented to the Indiana state courts. The question Clark presents to this Court, whether state administrative remedies must be exhausted prior to filing

a §1983 action in state court, was not presented to the Indiana Court of Appeals. Clark did not raise the issue until her Petition for Transfer to the Indiana Supreme Court. Clark at that final stage of state court litigation attempted to transform her case and argue issues which were never presented to the trial court or the Indiana Court of Appeals. In her Petition for Transfer to the Indiana Supreme Court some of Clark's statements were directly contrary to the position she took in her Brief of Appellee filed with the Indiana Court of Appeals. The Indiana State Supreme Court did not pass on the question now urged and the Petition for Transfer was denied. Clark's position was not litigated in the trial court or the appellate court.

If a state supreme court gives no opinion and the judgment may have rested on a nonfederal ground this Court will not take jurisdiction. *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). The Indiana Supreme Court will only consider constitutional questions which are first raised in the trial court. *City of Indianapolis v. Wynn* (1959), 239 Ind. 567, 582, 159 N.E.2d 572, 573. Although Clark may have argued her question before the Indiana Supreme Court, it was not properly presented to the court. As in *Stembridge*, the Indiana Supreme Court did not and could not decide the question which Nannie Clark has presented in her petition for writ of certiorari. Therefore Clark, like the petitioner in *Stembridge*, has not presented a question which is acceptable to this Court.

This Court has long recognized the importance of not rendering advisory opinions, requiring an actual case or controversy. In *United States v. Raines*, 362 U.S. 17, 21, (1960), this Court reaffirmed this position declaring:

> This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because

> irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899.

Granting Clark's petition would violate the two jurisdictional rules to which this Court has expressed rigid adherence because Clark's question is anticipatory.

Clark has clearly presented a question to this Court that is not represented by the facts of her case. The Court held in *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472 (1944), that under such circumstances it was without jurisdiction to consider the questions presented by the petitioner. *Id.* at 477. The procedural history of *McAdory* is very similar to that of Petitioner Clark's case. The petitioners in *McAdory* asserted that sections of the Bradford Act deprived them of their civil rights and conflicted with the National Labor Relations Act. *Id.* at 474. However, the contention that the Bradford Act conflicted with the National Labor Relations Act was not passed on by the Circuit Court. The issue was not presented to the Alabama Supreme Court nor did the court pass on that question. *Id.* at 477. This Court then held that, "Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been properly presented to the court for decision, we are without jurisdiction to consider it in the first instance here." *Id.* at 477.

II.

THE WRIT SHOULD BE DENIED BECAUSE THE DECISION BELOW DOES NOT DIRECTLY CONFLICT WITH THE DECISIONS OF OTHER STATE APPELLATE COURTS

Clark's question presented for review is actually two very different questions. One question is, "whether a plaintiff seeking relief under 42 U.S.C. §1983 in state court can be required to exhaust state administrative remedies." The second question is, "whether a plaintiff seeking relief under 42 U.S.C. §1983 in state court can be required to file a state tort claims notice." Clark claims the Indiana Court of Appeals considered the Indiana Tort Claims Act procedures to be an administrative remedy. The Indiana Court of Appeals concluded the notice requirement was a procedural precedent to a §1983 suit, not an administrative remedy. The court's citation to earlier Indiana cases requiring exhaustion does not imply the court considered the Indiana Tort Claims Act to be an administrative remedy. In fact, the Court had no Indiana precedent for the application of the notice provisions to §1983 litigation.

Even in the question presented to this Court, Clark fails to distinguish between an administrative remedy and a notice of tort claims act. The Indiana Tort Claims Act is not an administrative remedy. It simply requires a person to file notice of his claim with the attorney general and the state agency involved. State administrative remedies for medicaid recipients are contained in the Indiana Administrative Code. 470 Ind. Admin. Code §2-1-11. Petitioner Clark did exhaust her administrative remedies. However, she did not file the required tort claims notice.

In her Statement of the Case, Clark confuses the issue by referring to the Indiana Tort Claims Act as a remedy. The notice required by that statute is actually no more than a letter written to the attorney general's office and the state agency within 180 days of the alleged loss. Its purpose is,

"...to inform the agency of the circumstances surrounding the incident so it can investigate and determine its possible liability and prepare a defense to the claim." *Indiana Department of Public Welfare v. Clark* (1985) Ind. App., 478 N.E.2d 699, 703.

The administrative remedy afforded to Clark included notice, a fair hearing and a review of the hearing officer's decision by the state board of public welfare. It was this procedure which eventually led to Nannie Clark's receiving her dentures. Damages, however, "...are not available under the AAA and thus the Department was never exposed to liability throughout the administrative process." *Id.* at 703.

As a result of Clark's failure to distinguish between tort claim notice acts and administrative procedure acts many of the cases she presents to this court are not in conflict with the Indiana decision as she claims. A conflict cannot exist when the issues are entirely different. Clark argues that the decisions of the Supreme Court of Connecticut and the Supreme Court of Rhode Island directly conflict with the Indiana Court of Appeal's decision. However, the two cases cited by Clark, *Fetterman v. University of Connecticut*, 192 Conn. 539, 473 A.2d 1176 (1984) and *O'Connors v. Helfgott*, ___ R.I. ___, 481 A.2d 388 (1984) are both exhaustion of remedies cases; neither involved a tort claims notice act.

Two of the cases cited by Clark, do deal with state tort claims acts. In *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982) the court stated, "The notice of claim requirements of IC §6-905 are inapplicable to a cause of action under 42 U.S.C. §1983." *Id.* at 892. The ultimate decision in *Overman*, however, is not based on the notice requirements of the Idaho Tort Claims Act. The court's conclusion in that case is based on its view of granting absolute immunity to an individual acting in his capacity as a witness. The court's statement concerning the notice provisions of the tort claims act are actually no more than dicta and should not be considered as an authoritative statement by the Supreme Court of Idaho.

The decision in *Williams v. Horvath*, 129 Cal. Rptr. 453, 548 P.2d 1125 (1976) deals squarely with the notice provisions of the California Tort Claims Act. That court refers to the notice requirement as a, "...substantive impediment in the path of a state cause of action." *Id.* at 458, 1130. The California Tort Claims Act, however, only allowed a claimant 100 days to file his notice. The Indiana Tort Claims Act allows a claimant 180 days to file his notice. Indiana allows more than two months additional time to file a claim than does California. Also, the reasoning that a notice of tort claim is a "substantive impediment" should be rejected. The effect of not filing a notice of claim can be devastating to the prospective litigant, but the requirement of simply writing what amounts to a letter to the state concerning the claim can hardly be called a substantive impediment. As this Court made clear in *Wilson v. Garcia*, ___ U.S. ___, 105 S.Ct. 1938 (1985) an abbreviated statute of limitations may not be applied to §1983 litigants. It must be kept in mind, however, that the notice provisions of the Indiana Tort Claims Act are not a statute of limitations.

III.

THE WRIT SHOULD BE DENIED BECAUSE THE DECISION BELOW DOES NOT CONFLICT WITH OTHER DECISIONS OF THIS COURT

Clark's comparison of *El Paso and Northeastern Railway Co. v. Gutierrez*, 215 U.S. 87 (1909) to her case fails for two major reasons. Clark claims the territorial notice of claim statute is almost identical to the Indiana Tort Claims Act. However, if one reads the entire statute, the many critical differences are apparent. The New Mexico Territorial statute was passed due to the number of plaintiffs being injured within the Territory yet commencing suit outside the Territory. In addition the statute applied to suits against all persons and corporations, it was not limited to actions against the Territory. A claimant was required to

file a petition within 90 days or lose his cause of action entirely. The notice requirement of the New Mexico Territorial Statute placed a substantial burden on a claimant. Within three months of the loss a claimant had to submit an affidavit before an officer of the Territory. Indiana's notice requirement is not a burden. A claimant need only mail notice to the attorney general and the state agency involved. No personal appearance before an official, nor any travel is required. Also the Indiana claimant has twice as long to file the notice.

In addition, the *Gutierrez* statute had far reaching effects because of procedures available to the person allegedly responsible for the claimant's injury. This person could file a petition requiring the claimant to sue him and issue a summons for the claimant. If the claimant did not respond by filing a complaint, the court would then try the issue in the claimant's absence and issue a judgment.

Clark also attempts to equate the Indiana Tort Claims Act notice requirement with a shift in the burden of persuasion. The Indiana Tort Claims Act simply requires a party to provide notice to the attorney general and the state agency. In *Garrett v. Moore — McCormack Co.*, 317 U.S. 239 (1942) this Court held that the state law could not shift this burden to the plaintiff. Clark's comparison of her case to *Garrett* fails. The Indiana Tort Claims Act does not shift any burden to the plaintiff. A person need only submit a brief notice to the state. There is no procedural change which affects the plaintiff throughout his case as was true in *Garrett*. Clark and other persons claiming a state violation of their rights do have the benefit of the full scope of their federal rights. No policy that is "inhered" in Clark's cause of action was rejected.

Again Clark's reliance on an earlier decision by this Court is misguided. She fails to note the many and critical distinctions between *Brown v. Western Railway of*

Alabama, 338 U.S. 294 (1949) and her case. In *Brown* the issue was the application of strict local rules of code pleading to a federal right. *Id.* at 298. However, the Indiana Tort Claims Act is not a strict procedural rule which traps unwary plaintiffs. The Indiana Tort Claims Act simply requires a person to file a notice of claim within 180 days of the loss. This Court found the pleading requirements in *Brown* to be an unnecessary burden on a federal right. *Id.* The Indiana Tort Claims Act notice requirement is not an unnecessary burden because it protects important state interests. The notice requirement protects the state from the burden of defending stale or fraudulent claims.

Petitioner's reliance on *Martinez v. California*, 444 U.S. 277 (1980), *rehearing denied*, 445 U.S. 920 (1980) and *Maine v. Thiboutot*, 448 U.S. 1 (1980) is misplaced. Clark attempts to apply the specific holdings of these decisions to her case. The California immunity statute raised in *Martinez* provided a complete defense for the police officers. The Indiana Tort Claims Act does not give the state absolute immunity to a §1983 claim. The §1983 litigant need only file notice within the statutory period. Petitioner interprets the holding of *Maine v. Thiboutot* too broadly. This Court stated in *Thiboutot* that attorney fees were reasonable in §1983 actions in state and federal courts, not that all policies applicable to §1983 were applicable whether or not the claim was filed in federal or state court. *Id.* at 11. The Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. §1988, states that attorney fees may be had in any action to enforce one of the enumerated provisions. This Court noted that if §1983 litigants could not meet the $10,000 jurisdictional requirement for federal court, they would have to file their claim in state court. This would be contrary to Congressional intent as plaintiffs would still face financial disincentives in asserting their federal rights. *Id.* at 11 n.12. The Indiana Tort Claims Act is not contrary to a federal statute nor does it frustrate Congressional intent. A §1983 claimant in Indiana does not face a financial

disincentive to filing his claim in state court. *Thiboutot*, therefore, is not persuasive.

IV.

THE WRIT SHOULD BE DENIED BECAUSE THE DECISION BELOW DOES NOT RAISE IMPORTANT ISSUES IMPLICATING ESTABLISHED PRINCIPALS OF FEDERALISM

Petitioner Clark repeatedly asserts that one of the most important issues concerning §1983 today is whether §1983 litigants must exhaust their administrative remedies prior to filing suit in state court. This very issue was presented to this Court in *Thompson v. Medical Licensing Board*, (1979) 180 Ind. App. 333, 389 N.E.2d 43, *rehearing denied*, 180 Ind. App. 347, 398 N.E.2d 679 (1979), *transfer denied*, (1980), *cert. denied*, 449 U.S. 937 (1980). In *Thompson* the Indiana Court of Appeals held a §1983 litigant must exhaust his administrative remedies prior to filing suit in state court. Clark claims this is a flagrant rejection of federal law. However, as the *Thompson* citation clearly indicates the decision was appealed to this Court and the writ of certiorari was denied. *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982) established that §1983 litigants need not exhaust their administrative remedies prior to filing suit in federal court. Clark, in her petition, states that since *Patsy* was decided this Court has not had an opportunity to decide if the principle applies in state courts also. This is incorrect.

The California Court of Appeals held *Patsy* applied only to §1983 cases brought in federal court. The plaintiff, Caylor, filed suit in state court alleging employment discrimination. However, Caylor neglected to exhaust his administrative remedies and his §1983 claim was dismissed. The case was appealed to this court and the writ of certiorari was denied. *Caylor v. City of Red Bluff*, No. 20852 (Cal. Ct. App. 1985), *review denied*, (Cal. 1985), *cert.*

denied, ___ U.S. ___, 106 S.Ct. 605 (1985). Clark also cites *Mills v. County of Monroe*, 59 N.Y.2d 307, 464 N.Y.S.2d 709 (1983), *cert. denied*, 464 U.S. 1018 (1983) a decision by the Court of Appeals of New York in her petition. Mills alleged employment discrimination by the county due to her race and national origin. She filed suit in state court alleging violation of her state and federal civil rights. The court dismissed the complaint, including her 42 U.S.C. §1981 claim, because Mills did not file a tort claims notice with the county. The court held filing notice within the 90 day statutory period was a procedural precondition to filing suit. Clark, however, neglects to remind this Court in her petition that it denied Mills' petition for writ of certiorari. At least three times this Court has had the occasion to decide if §1983 state court litigants must exhaust their administrative remedies before filing suit, one opportunity as recent as 1985. These denials are the best evidence that this Court does not find this requirement to be in conflict with the principles reiterated by it.

Petitioner's continued reliance on *Patsy* to support her position is unpersuasive. Clark claims the holding in *Patsy* is not expressly limited to actions in federal court. However, Clark fails to realize that this Court has no jurisdiction to decide constitutional questions which are broader than is necessarily required. *Liverpool, N.Y. & P.S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). Therefore, although not expressly stated, the holding in *Patsy* is limited to federal court actions because *Patsy* was a federal case. Clark also asserts that the underlying rationale of *Patsy* is not limited to federal courts. However, a careful reading of the rationale, the intent of Congress, clearly indicates that *Patsy* is limited to cases brought in federal court.

In her petition Clark argues the intent of the 1871 Congress was to provide litigants with immediate access to court. This is only partially correct. As this Court stated in *Mitchum v. Foster*, 407 U.S. 225, 242, (1972) (quoting *Ex*

parte Virginia, 100 U.S. 339, 346, 25 L.Ed. 676 (1880)), "[t]he very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" quoted in *Patsy*, 457 U.S. at 503. Also the many remarks of the 1871 Congressional representatives all refer to providing access to federal courts. *Id.* at 503-504.

Clark maintains that the Supremacy Clause prevents state courts from utilizing state rules of procedure to frustrate Congressional policies. Requiring a §1983 state court litigant to exhaust his administrative remedies or file a notice of tort claims does not frustrate Congressional policy. The intent of the 1871 Congress was to provide access to federal courts. Indiana's requirements do not burden a person's access to federal courts or state courts. Therefore, there is no violation of the Supremacy Clause. Finally although many delegates interpreted the bill to provide concurrent state and federal forums, they did not necessarily intend the forums to be identical procedurally.

CONCLUSION

WHEREFORE, Respondents respectfully pray that this Court deny Nannie Clark's petition for writ of certiorari to the Indiana Court of Appeals, First District.

Respectfully submitted,

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